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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/773,250

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Michael J. Alberts

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06/19/2006

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EXAMINER

GARCIA, ERNESTO

ART UNIT

PAPER NUMBER

3679

DATE MAILED: 06/19/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/773,250	<b>Applicant(s)</b> ALBERTS, MICHAEL J.	
	<b>Examiner</b> Ernesto Garcia	<b>Art Unit</b> 3679	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 29 March 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 13 and 14 is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☒ Claim(s) 9-12 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### ***Drawings***

The drawings are objected to because the cross-hatching in Figures 4a-4C should be deleted because the views are front views of the modules. The reference character 13 on the vertical member 5 should be --12-- because Figure 2a has set forth that 12 is the inside side edge of the vertical member 5. Further, these views do not appear to be front views of the modules as described on the description of the drawings. Further, the upper corner in the modules shown Figures 5a and 5b is not shown correctly because the connection at the upper corner does not appear as that shown in Figure 2a. Accordingly, a line needs to be placed across member 5 to show the corner connection between the vertical member 5 and member 6 as shown in Figure 2a.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended". If a drawing

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figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the examiner does not accept the changes, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Claim Objections***

Claims 4-6, 9, and 13 are objected to because of the following informalities:

regarding claim 4, "means for pivotal attachment" in line 2 should be changed to -attachment means-- to maintain consistent terminology;

regarding claim 5, "attached" in line 3 should be deleted;

regarding claim 6, "support" in line 2 should be --supports--;

regarding claim 9, --the-- needs to be inserted before "two" in line 13, "subsequent" in line 14 and "successive" in line 16 should be deleted;

regarding claim 13, "successive" in line 13 should be deleted, "the first fence module" in line 20 should be --a first fence module-- as a first fence module has not been previously recited, and the fourth occurrence of "the" in line 20 should be --a-- as a

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subsequent fence module has not been previously recited, and "the ground" in line 22 should be --a ground--. Appropriate correction is required. For purposes of examining the instant invention, the examiner has assumed these corrections have been made.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 1, the metes and bounds of the claim is unclear. The claim seeks to define one module according to the preamble; yet, lines 12-16, refer to multiple modules nested together. Further, the claim defines that the angle arms of each successive module are fitting between the horizontal and substantially vertical members of a previous module. Accordingly, is the claim defining a single module or multiple modules stacked? If only one module is being set forth, how do the references to additional modules structurally define and limit the one module? For purposes of examination, the examiner has only considered a single unitary, stackable fence module.

Regarding claim 3, the limitation “a first end support and a second end support” makes unclear whether these are different supports than those previously recited in claim 1, line 3. The limitation “the first and second end assemblies” in line 3 lacks antecedent basis. Further, the metes and bounds of the claim is unclear because the claims first seek to define one module in the preamble; yet, the language “co-operate with the attachment means on the first end support of the subsequent fence module” in lines 6-7, and “the first module and subsequent module are rotatable about the pivotal attachment” in lines 8-9, then implies the presence of multiple modules. How many modules are being claimed?

Regarding claims 2 and 4-7, the claims depend from claim 1 and therefore are indefinite.

Regarding claim 8, the “subsequent fence modules” are clearly positively being required. Accordingly, it is unclear how the claims can relate to a single module (note the preamble) when there are multiple modules.

Regarding claim 9, it is not clear what disclosed structure actually constitutes the claimed “means for pivotal attachment”. First, it is noted that the last paragraph of claim 9 states that each end support of each module has a “means” connected thereto. The specification describes loops 16 connected to each end support of each module and that loops at the ends of respective adjacent modules accept a single pin 17 to pivotally

interconnect the two adjacent modules. However, claim 11 sets forth that the "means" comprises a pin and loops. This would mean that there would have to be two pins connecting the adjacent ends of a respective pair of modules. There is no support for two pins between each end of the modules connecting them together. Accordingly, either the "means" has not been properly set forth in claim 9 or the pin cannot constitute a part of the "means" as is set forth by claim 11.

Regarding claim 10, note the comments above with respect to claim 9. Further, it is unclear as to how the "first" and "subsequent" modules can be "rotatably about the pivotal attachment means" if such "means is in whole or in part constituted by the loops 16 since the modules are not rotatable with respect to the loops 16 attached to each module. It is suggested that the claim define the pin 17 and then state that the modules are rotatable about the pin.

Regarding claims 11 and 12, the claims depend from claim 9 and therefore are indefinite.

### ***Double Patenting***

Claim 13 is objected to under 37 CFR 1.75 as being a substantial duplicate of claim 12. When two claims in an application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is

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proper after allowing one claim to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k). Applicant should note that there is no structural difference seen between the two claimed systems.

***Claim Rejections - 35 USC § 102***

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by Lape, 257,168.

Regarding claim 1, Lape discloses, in Figure 1, a unitary, stackable fence module comprising: two end supports (one side view of a support is shown in Figure 1), and span members **a, a'**. Each end support has a substantially vertical member **B, B'**, a horizontal member **D, D'**, and an angle arm **A, A'**. The vertical member **B, B'** is connected at a lower end to a first end of the horizontal member **D, D'** and the angle arm **A, A'**. The angle arm **A, A'** is connected between an upper end of the substantially vertical member **B, B'** and a second end of the horizontal member **D, D'**. The vertical member **B, B'** and the horizontal member **D, D'** are in the same plane. The span members **a, a'** are connected between the angle arm **A, A'** of each end support, spacing the end supports apart, wherein, the angle arm **A, A'** is attached to an inside side edge of each of the substantially vertical member **B, B'** and the horizontal member **D, D'** adjacent the span members **a, a'**.



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Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by McKinnon, 1,545,909.

Regarding claim 1, McKinnon discloses, in Figure 3, a unitary, stackable fence module comprising: two end supports (one side view of a support is shown in Figure 2), and span members 2. Each end support has a substantially vertical member 9, a horizontal member 11, and an angle arm 4. The vertical member 9 is connected at a lower end to a first end of the horizontal member 11 and the angle arm 4. The angle arm 4 is connected between an upper end of the substantially vertical member 9 and a second end of the horizontal member 11. The vertical member 9 and the horizontal member 11 are in the same plane (note that their sliding surfaces share a plane). The span members 2 are connected between the angle arm 4 of each end support, spacing the end supports apart, wherein, the angle arm 4 is attached to an inside side edge of each of the substantially vertical member 9 and the horizontal member 11 adjacent the span members 2.

***Claim Rejections - 35 USC § 103***

Claims 2 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lape, 257,168, as applied to claim 1, and further in view of Kummerlin et al., 4,502,564.

Regarding claim 2, Lape, as discussed, fails to disclose a spacer positioned between the angle arm and the inside side edge of the vertical and horizontal members for providing additional tolerance between each modules for stacking. Kummerlin et al. teach a spacer 117 (col. 7, lines 31-34) positioned between an angle arm and an inside side edge of a vertical member and a horizontal member to act as a bearing between the angle arm and the inside side edge of the vertical member and the horizontal member. Therefore, as taught by Kummerlin et al., it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide a spacer between the angle arm and the inside side edge of the vertical and horizontal members to behave as a bearing between the inside side edge of the vertical and horizontal members and the angle arm.

Regarding claim 6, Lape, as discussed, fails to disclose the end supports and the span members formed of tubular steel. Applicant is reminded that making the end supports and the span member of tubular steel is an obvious matter of design choice as tubular steel is readily available as a stock material. Further, Kummerlin et al. is provided as evidence that tubular steel is well known to make span member and end supports.

Claims 3, 4, and 8 are rejected under 35 U.S.C 103(a) as being unpatentable over McKinnon, 1,45,909, as applied to claim 1, and further in view of Faught, 300,455.

Regarding claim 3, McKinnon shows the end supports being a first end support and a second end support. However, the first end support and the second end support do not have attachment means attached to the vertical member to permit pivotal attachment to a subsequent fence module. However, Faught teaches using an attachment means to permit pivotal attachment, in Figures 1, as seen between the modules to permit pivotal attachment between modules to create a pivotal fence to be set at different angles. Therefore, as taught by Faught, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a pivotal attachment as taught by Faught to allow the fence module of McKinnon to be set at different angle with respect to another module.

Regarding claim 4, a pin and loops are arranged along each vertical member so as to permit vertical alignment of the loops between the second end of the first fence module and the first end of a subsequent fence module to permit passage of the pin therethrough.

Regarding claim 8, given the teachings of Faught, it would have been obvious matter of design choice to enclose an area by placing the module and subsequent modules pivotally connected to form a polygonal shape.

Claim 5 is rejected under 35 U.S.C 103(a) as being unpatentable over McKinnon, 1,45,909, in view of Fought, 300,455, as applied to claims 3, 4, and 8, and further in view of Walter, 197,806.

Regarding claim 5, McKinnon, as discussed, fails to disclose the pin being of sufficient length to engage a ground. Walter teaches, in Figure 1, a pin A' being of sufficient length to engage a ground to anchor modules. Therefore, as taught by Walter, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the pin of Walter to replace the pivotal connection provided by Fought, to anchor the modules and to allow the modules to rotate relative to each other.

Claim 6 is rejected under 35 U.S.C 103(a) as being unpatentable over McKinnon, 1,545,909, in view of Neely, 1,214,705.

Regarding claim 6, McKinnon, as discussed, fails to disclose the supports and the span members formed of tubular steel. Neely teaches, in Figure 1, end supports and span member formed of tubular steel as part of a design choice to make a module. Therefore, as taught by Neely, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the supports and the span members formed of tubular steel to make the fence module more aesthetic or light weight.

Claim 7 is rejected under 35 U.S.C 103(a) as being unpatentable over McKinnon, 1,45,909, as applied to claim 1, and further in view of St. John, 5,533,714.

Regarding claim 7, as discussed, McKinnon fails to disclose the module further comprising a man door formed intermediate the span members. St. John teaches, in Figure 7, a man door formed intermediate span members to allow access to an enclosure made by more than one module. Therefore, as taught by St. John, it would have been obvious to one of ordinary skill in the art at the time the invention was made to place a man door formed intermediate the span member of McKinnon to allow access to an enclosed area formed by placing more than one module of McKinnon.

***Allowable Subject Matter***

Claims 13 and 14 are allowed.

Claims 9-12 would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action.

The following is a statement of reasons for the indication of allowable subject matter:

regarding claims 9 and 13, the prior art of record does not disclose or suggest a fence system comprising angle arms of two end supports of each of three or more fence

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modules, fitting between a horizontal member and a substantially vertical member of a previous module in a nested arrangement (claim 9, lines 16-18; claim 13, lines 12-14).

The closest prior art to McKinnon, 1,546,909, discloses a module as claimed; however, there is no motivation, absent applicant's own disclosure, to modify McKinnon because the angle arms of the two end supports are not nested so that the arms fit between a horizontal member and a substantially vertical member of a previous module;

regarding claim 10-12, these claims directly or indirectly depend from claim 9;

and,

regarding claim 14, this claim depends from claim 13.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1-12 have been considered but are moot in view of the new ground(s) of rejection.

With respect to McKinnon, applicant argues that the reference cannot stack in a nested arrangement. In response, applicant is reminded that claim 1 is directed to a module and not modules that are stacked. Further, McKinnon teaches all the structural limitations of a module and the term stackable is given its broadest reasonable interpretation since anything can be stacked.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. In particular, the new limitations "each subsequent module nested within an adjacent lower module of the two or more unitary fence modules" in claim 1, lines 12-14, "in a nested arrangement" in claim 1, line 16, necessitated the new grounds of rejection, and "modules, each subsequent module nested within and adjacent lower module of the two or more unitary fence modules" in claim 9, lines 14-16, necessitated the new grounds of rejection. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernesto Garcia whose telephone number is 571-272-7083. The examiner can normally be reached from 9:30-5:30. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached at 571-272-7087.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*E.G.*

E.G.

June 7, 2006

A handwritten signature in black ink that reads "Daniel P. Stodola". The signature is written in a cursive style with a large, looped initial "D".

DANIEL P. STODOLA  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3600